

1 IN THE UNITED STATES COURT OF FEDERAL CLAIMS
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3 MATTHEW CHRISTENSEN, et al.,)
4 Plaintiffs,)
5 vs.) Case No. 20-935T
6 UNITED STATES OF AMERICA,)
7 Defendant.)
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11 United States Court of Federal Claims
12 717 Madison Place, N.W.
13 Washington, D.C.
14 Wednesday, June 22, 2022
15 11:00 a.m.
16 ORAL ARGUMENT
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19 BEFORE THE HONORABLE MARIAN BLANK HORN
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25 Susanne Bergling, RMR-CRR-CLR, Court Reporter

Matthew Christensen, et al. v. USA

6/22/2022

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1 PROCEEDINGS

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3 (Proceeding called to order, 11:02 a.m.)

4 THE COURT: All right. The case on the docket
5 is -- and I'm not sure if I'm pronouncing the name
6 properly -- Matthew and Katherine Kaess Christensen,
7 Docket Number 20-935T. This is the oral argument after
8 submissions of motions and cross motions for summary
9 judgment, and we will proceed.

10 I'd ask you, please, Counsel, to introduce
11 yourselves, and then I'll make a couple of comments and
12 requests, and we'll go from there, but let's start with
13 the Plaintiff.

14 MR. HORWICH: Good morning, Your Honor. My name
15 is Stuart Horwich. I represent the Plaintiffs in this
16 matter.

17 THE COURT: I can tell you right now you are
18 going to have to talk louder. We do have a number of
19 people in the audience, including my law clerks, my
20 interns, and other interns or clerks from other offices,
21 and I do want them to have the experience of hearing two
22 expert attorneys presenting. So keep your voices up.

23 All right. For the Defendant?

24 MR. BERGMANN: Yes. My name is Jason Bergmann
25 from the Tax Division of the Department of Justice for

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1 the United States.

2 THE COURT: Very good. Thank you.

3 All right, a couple of things. No abbreviations,
4 please. You-all live in this world. I don't
5 constantly, although I have lived in it for a while
6 since being on the Court, so let's talk in full
7 sentences and not the tax practice acronyms that you-all
8 use every day but I do not.

9 And also I want to be sure that you clearly
10 outline the characteristics of your Plaintiffs,
11 particularly with respect to how they would fit into the
12 arguments on the Tax Treaty, and the first thing I would
13 like you to start with, Mr. Horwich, is let's talk
14 about -- well, actually, I would like to start with
15 Mr. Bergmann on the issue of whether the claim was
16 timely or not, and let's get that out of the way.

17 MR. BERGMANN: Yes, Your Honor. The claim was
18 timely.

19 THE COURT: Okay. That's what I expected to be a
20 brief answer, but I needed to make sure.

21 MR. BERGMANN: Yes. I can elaborate if you would
22 like, but I think the claim is timely is probably
23 sufficient.

24 THE COURT: And what's -- give me the basis that
25 the -- because obviously at one point there was an

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1 assertion of untimeliness.

2 MR. BERGMANN: Yes. Claims based upon foreign
3 tax credits have an extended statute of limitations that
4 is different from other refund claims under the Code.

5 THE COURT: Right, and that's what I've seen.

6 That would have been probably a loss for you had that
7 been maintained, but I think that's the right answer.

8 MR. BERGMANN: Oh, yes. Yes, Your Honor.

9 THE COURT: All right, thank you.

10 All right. Mr. Horwich, we turn to you, and why
11 don't we start with your argument. If you want to do it
12 from the table, you can, or you can come to the podium,
13 whichever you're more comfortable with.

14 MR. HORWICH: I think I will come to the podium.

15 THE COURT: That's fine.

16 MR. HORWICH: And I will try to shout.

17 I do want to thank the Court and especially
18 Mr. Bergmann. I have had a couple of personal issues,
19 COVID and otherwise, and it was very good to have that
20 sorted without any problems, especially Mr. Bergmann
21 telling me within 30 seconds of getting emails that it
22 was all okay.

23 THE COURT: And you do have to keep your voice up
24 higher, because even I am having some trouble hearing
25 you.

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1 MR. HORWICH: Sorry.

2 Okay, this is a tax case. In fact, it's a treaty
3 interpretation case.

4 THE COURT: All right. Let me stop you for a
5 second.

6 Can you-all hear? No problem? Okay, good. At
7 this volume, we can. Otherwise, we can try to get him
8 to turn up the volume if that's going to assist, but go
9 ahead.

10 MR. HORWICH: Okay, sorry.

11 So this is a treaty interpretation case. The
12 question involved here is whether or not the taxpayers,
13 the Plaintiffs, are entitled to a treaty-based foreign
14 tax credit for the net investment income tax.

15 The question here starts off with Article 24 of
16 the treaty, and that article, it is the Plaintiffs'
17 contention, is broader than the Internal Revenue Code,
18 and that's in some respects quite easy to see in that in
19 parallel circumstances, such as the Danish hydrocarbon
20 tax -- which is the easiest one to say, but there are
21 numerous other ones -- the concept of what is a tax is
22 broader than what you would find in the Code.

23 And as a parallel, the concept of what is a
24 United States income tax is not merely a tax that is
25 what we think of as an ordinary income tax that falls

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1 within Chapter 1 of the Code. It includes the Chapter
2 2(a) provision of the Code; that is, the net investment
3 income tax or the Obamacare -- and I will try not to say
4 NIIT --

5 Well, you don't have to say Obamacare either.

6 You could say the NIIT, which is what it is. That's --
7 Obamacare is an acronym. We are going to avoid acronyms
8 in general.

9 MR. HORWICH: So I will say NIIT.

10 THE COURT: That's good.

11 MR. HORWICH: Okay. So let's take what is sort
12 of an example and the example hopefully will highlight
13 the Plaintiffs' position in this case.

14 Let us assume, as a very straightforward and
15 simple example, that the Plaintiffs in this case had
16 only one source of income. It was a capital gain. Let
17 us further assume that the --

18 THE COURT: When you say "let us take an
19 example," are you taking this example of the Plaintiffs?
20 Don't give me a different example. Give me the example
21 of this case. Let's not confuse things.

22 MR. HORWICH: Okay. So in this case the
23 Plaintiffs had a number of different types of income.
24 They had salary income, the conventional description of
25 earned income. That is not -- the credits on that

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1 earned income are not subject to dispute.

2 They had an amount of investment income. That
3 investment income can be categorized into two separate
4 pieces, investment income arising out of their
5 investments in the United States -- what we tax lawyers
6 would refer to as United States source income -- and
7 they also had investment income from the sale of some
8 shares and a little bit of French source interest
9 income.

10 That income, if we are following the language of
11 the treaty, the French source investment income was
12 subject to French tax as defined in the treaty. The
13 French tax was subject to a 30 percent rate. That is
14 the normal rate for tax on that French income.

15 The question then comes to is we know that there
16 was United States tax on that income. That United
17 States tax on that income was approximately 20 percent.

18 In addition --

19 THE COURT: Let me stop you for a minute. You're
20 talking about the French income, that it was a U.S.
21 rate, or what are you saying?

22 MR. HORWICH: Okay, sorry.

23 THE COURT: You have kind of melded the two
24 concepts.

25 MR. HORWICH: The French -- the tax on the French

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1 investment income, the Chapter 1 normal income tax on
2 that income was approximately 20 percent.

3 THE COURT: Right.

4 MR. HORWICH: In addition, there was NIIT applied
5 of 3.8 percent. Both the ordinary income tax and the
6 NIIT would meet the definition in the treaty of United
7 States income tax. That is something that I believe the
8 parties both agree.

9 The question then is whether or not, under the
10 terms of the treaty, the Plaintiffs can claim a tax
11 credit which would eliminate the entire amount of U.S.
12 ordinary tax and NIIT on that income. This turns on the
13 wording of the French treaty.

14 The French treaty wording says that it has to be
15 in accordance with the provisions and subject to the
16 limitations of U.S. law and, crucially, it goes on to
17 say "as amended from time to time without changing the
18 general principles thereof."

19 When one thinks of provisions, we are not
20 thinking about whether this was a French tax that's
21 defined in the treaty. We are thinking about things
22 such as is there something that we need to know about
23 that would cause us to disallow that credit?

24 Those things could be did the taxpayer meet the
25 holding period -- the Plaintiffs, sorry -- meet the

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1 holding period? Was the tax used as a subsidy? Did the
2 United States and France fall out over something else
3 and sever diplomatic relations? There are a number of
4 different ones. I could go on for quite a long time
5 about various exceptions that could cause a
6 disallowance.

7 The second thing one thinks about is are there
8 limitations. Limitations will limit the amount of the
9 credit. So, for instance, because we are confining
10 ourselves to only French source income, we don't need to
11 worry about whether or not there was U.S. source income.
12 You certainly could not credit the French tax against
13 U.S. source income. This is something the Plaintiffs
14 are certainly not trying to do.

15 So we get through that, we still have this 30
16 percent of tax credits, and what we want to do is we
17 want to claim those against the United States income
18 tax, which includes the NIIT, and there we get to the
19 parenthetical, the crucial parenthetical, which says
20 that we are allowed to claim this in accordance with
21 U.S. law and subject to the limitations "as amended from
22 time to time without changing the general principles
23 thereof."

24 What do we mean by "general principles thereof"?
25 The Treasury explanation is quite clear, and, indeed,

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1 the grammar is clear, too. The "principles thereof" is
2 that you get a credit. You get a credit of French tax
3 of 30 percent against United States income tax, which is
4 the ordinary income tax, the Chapter 1, plus the NIIT.
5 That is the Plaintiffs' case in this matter.

6 Now, clearly there is a disagreement on this, and
7 starting with the one court that dealt with this a few
8 months ago, the Toulouse court and the Tax Court, the
9 Toulouse court did not say that the "amended from time
10 to time without changing the general principles thereof"
11 focused on a credit. They said -- the Court said it
12 focused on the general -- the United States tax laws.
13 It didn't refer to a credit. That was wrong. Simple,
14 got it wrong.

15 So what do we do --

16 THE COURT: Well, let me stop you here for a
17 moment. I think we all agree on the answer to this, but
18 I would like to hear it from both of you. Toulouse is
19 basically the only outstanding precedent that you've
20 sort of relied on in terms of a case that's dealt with
21 something similar. You've called this a case of first
22 impression, and, of course, it's about very little
23 money, so are there other cases that you feel either go
24 for or against you?

25 But you've characterized it kind of with Toulouse

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1 in the background and a case of first impression. So do
2 you want to comment further on that, please?

3 MR. HORWICH: This case will have wide-ranging
4 impact.

5 THE COURT: Right.

6 MR. HORWICH: I am not aware of any other cases
7 pending in any court that would deal with this, and, in
8 fact, the way that this would come up procedurally, it
9 would be challenging -- is perhaps the right way -- for
10 it to be in any other court besides this one.

11 THE COURT: What about in the past? Have there
12 been comments on this -- the treaty's been around for a
13 while, amended from time to time, with some -- I mean,
14 are there other previous cases, other than Toulouse --

15 MR. HORWICH: Dealing with the NIIT and treaties,
16 no.

17 THE COURT: No, okay. So, clearly, that's why
18 you've characterized it as a case of first impression.
19 Is that correct?

20 MR. HORWICH: First impression in this Court, and
21 it was -- and the only other case I'm aware of was the
22 Toulouse case that came out, gosh, ten years ago.

23 THE COURT: Well, they kind of qualified their
24 result, too, a little bit there, but --

25 MR. HORWICH: I'm aware.

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1 THE COURT: Yeah.

2 MR. HORWICH: But I don't want to mince words. I
3 think that the statement that -- the Court simply got it
4 wrong, and it got it wrong for that reason. I think it
5 also got it wrong because it did not consider that, in
6 fact, the concept of what is in Toulouse both a French
7 tax and an Italian tax is wider than the concept of what
8 is a creditable tax under U.S. tax principles.

9 Indeed, it's difficult to understand, given that
10 the Italian tax, the IRAP in Italy, has specifically
11 defined noncreditable tax that has a tax defini -- that
12 is still allowed as a credit, the Court glossed over it.
13 So that side of it definitely, we believe, was error.

14 In terms of where we go from here, so I have a
15 situation where we have a French tax. It gets through
16 the provisions and limitations to not -- to still be
17 available. It is more than the amount of U.S. income
18 tax and NIIT, and, therefore, we expect a credit.

19 We do have to interpret this treaty, and the
20 language that I've done, the reason we interpret it this
21 way, we have standard treaty interpretation. Standard
22 treaty interpretation starts with what is the shared
23 expectations of the treaty partners. I know the
24 Government takes a bit of issue with this; however, you
25 would have -- you can't read a Supreme Court case that

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1 says anything other than that.

2 Where the Government says that they're only aware
3 of one case from the Supreme Court in the last 50 years,
4 the response to that would be, well, how many Supreme
5 Court cases go the other way, please? And the answer is
6 zero.

7 If you go look at Court of Appeals cases in the
8 Tax area, every single one of them will tell you that
9 shared expectation is the standard. Indeed, in the case
10 which I chased for nine years, Eshel, the Government's
11 interpretation standard was described as the equivalent
12 of clapping with one hand. You have to look at what the
13 parties -- the treaty parties would expect. That's one
14 statement.

15 The next statement is that you have to be -- when
16 you have two interpretations, a narrow one and a liberal
17 one, you go with the liberal one. Again, there's
18 Supreme Court case law on point. Again, the Government
19 takes issue with that. Where the Government takes issue
20 with that, it says this is the sovereign -- I'm trying
21 to describe this -- this is -- the sovereign rights of
22 taxation are paramount, and they should be strictly
23 construed.

24 Well, actually, a tax treaty is a discussion
25 between two sovereigns, and it's a trade-off. You get

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1 to tax stuff that maybe I should have gone first, and I
2 get to tax stuff that maybe you should have gone first,
3 creates less friction, is better for business, better --
4 might be easier for us to administer, and that's why we
5 have a tax treaty.

6 THE COURT: Let me stop you for a moment. It is
7 pretty common for the United States, when defending
8 cases, to take a narrow interpretation view of many
9 different areas on the sovereign immunity principle.
10 Why is that different here?

11 MR. HORWICH: The purpose of the -- we'd have to
12 go back a step. Back a step is what is the shared
13 expectations of the parties, the treaty parties. In
14 other words, the United States on the one side, France
15 on the other. The shared expectation is the starting
16 point of that analysis. Taking a narrow view defeats
17 the starting point of why they entered into the treaty.
18 They entered into the treaty -- it says on its face they
19 entered into the treaty in order to avoid double
20 taxation.

21 THE COURT: So it's not really a narrow view.
22 You're looking back -- or a liberal view. You're
23 looking back at the words of the treaty.

24 MR. HORWICH: I'm looking at the words of the
25 treaty, and I am interpreting them in order to fulfill

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1 its purpose and --

2 THE COURT: So it's not that I would have to come
3 down with you the path of saying it's a liberal
4 interpretation. It could -- the result could come just
5 from the fact that there's treaty language setting the
6 expectation, or are the two inconsistent?

7 MR. HORWICH: No, they are not inconsistent. In
8 fact, what I would use the word -- which I think is what
9 you have been -- what you have mentioned here, is it is
10 a purposeful view. What is the purpose of the treaty,
11 the language in accordance with its purpose?

12 THE COURT: So we're talking about the intent of
13 the parties basically if we were to refer to contractual
14 terms?

15 MR. HORWICH: Yes. I mean, intent of the
16 parties, it -- the -- I think "expectation" is a better
17 word, and the reason why "expectation" is a better word
18 is because you could not -- when NIIT doesn't exist at
19 the time that the treaty is entered into, intent becomes
20 a little bit -- it moves a little bit towards
21 expectation. I think had NIIT existed, we probably
22 would have been looking at this a little bit
23 differently.

24 So -- and I will take issue with the Government's
25 view of a narrow interpretation protecting the Fisc.

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1 Indeed, we get -- the reason that the Government has
2 opted for this in its brief is one Fifth Circuit case
3 dealing with how you serve process and a law review
4 article which, if they had quoted from the rest of the
5 paragraph rather than stopped where they did, they would
6 have come to the exact opposite conclusion.

7 Put another way, the Supreme Court -- I have
8 Supreme Court authority. I have this Court's authority.
9 I have -- I can't come up with a single tax case that
10 does not say that, following up on what we are -- the
11 argument that we are making. So it comes down to a
12 straightforward situation. So the general principle is
13 that we get a credit. The credit is for -- against
14 United States income tax. On that basis, the Plaintiffs
15 have proven their case.

16 I would like to make sort of three more
17 observations. The first observation is although we have
18 a lot of extrinsic authority, which is always useful to
19 look at in a treaty interpretation case, that extrinsic
20 authority predates the NIIT, all of it, and the reason
21 that's important is not merely that the world has moved
22 on but that prior to the NIIT, when you think of United
23 States income tax and you think of the rules under the
24 Code that allow for a credit, United States income tax
25 and rules that would allow for this under the Code were

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1 the same thing. There was no dichotomy. We didn't have
2 the United States equivalent of the IRAP or the Danish
3 hydrocarbon tax.

4 So to read commentary that deals with, in this
5 case, the French side of things and to try to apply that
6 solely to the United States and say, "You see, that
7 applies to the United States," it -- it -- you are
8 talking apples and oranges.

9 The United -- the questions that involve the
10 provisions and the limitations were based on what French
11 taxes were going to be allowed. It goes back to the
12 basic point of how the U.S. tax credit system works.
13 The United States tax credit system works where we look
14 at a tax and we say, is that a creditable tax? The
15 French, is that a creditable tax? We don't say, did
16 that item translate -- the item of income have a tax on
17 which the United States applies a tax? We look at
18 whether the French tax was creditable.

19 When we look at limitations, we look at
20 limitations for cross-crediting. Those are amounts.
21 Both parties, although we use different examples, agree
22 on all of this. In mine, it was the French and the
23 Swiss. It's easy to imagine that sometimes you can
24 cross-credit if they were in the same category, and
25 sometimes you can't. Those are cross-crediting. Those

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1 are provisions. Was it a creditable tax limitation?
2 How much could you do? With but we never had to worry
3 about United States income tax because we never had to
4 consider it because it never came up.

5 Here it comes up, and in any context of
6 reciprocity -- and I know the Government takes issue
7 with reciprocity, but this is what a treaty is about --
8 the expectations of the parties are always going to be
9 you give up some, I give up some, it works better for
10 both of us.

11 It is extraordinary to say that in a situation
12 where, when the United States has primary taxing
13 authorities, the French are going to have to give a
14 credit for NIIT, but when the French have primary taxing
15 authorities, the United States does not have to. That's
16 an extraordinary statement.

17 The second point that I would like to follow up
18 on is simply a procedural one. The Government takes
19 issue with whether or not there should be a remand
20 because we have not demonstrated that we complied with
21 what they call the three-bite rule. That position is,
22 again, simply wrong.

23 I have submitted affidavits. I have submitted
24 French tax returns or French avis d'impot, which is
25 the -- effectively the receipt, and I've submitted U.S.

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1 tax returns. All of those show we did not try to claim
2 a credit for any U.S. -- a credit -- a French tax credit
3 for any U.S. source income tax.

4 I will go further and say that I have asked the
5 Government from the very outset of this case, what do
6 you need? What documents do you want from me? And
7 they've repeatedly said none. It's only at the last
8 minute that they came up and said we need a remand
9 because you haven't established it.

10 THE COURT: What typically would you think
11 they're asking for? I mean, obviously Mr. Bergmann can
12 articulate what he thinks is missing, but you've been in
13 this area of practice for a long time. What is it that
14 you think they -- or what has Mr. Bergmann said to you
15 is missing?

16 MR. HORWICH: Mr. Bergmann has asked me for a
17 copy of the French tax return, but I would have to
18 translate that, and, frankly, this is a -- I would have
19 if they had asked for it, but they didn't ask for it
20 during discovery, and I have met my burden.

21 THE COURT: All right. So we've talked about
22 this before, obviously, and the fact that it has to be
23 translated is not a huge deal. It is some -- it can be
24 somewhat costly, but it's not enormous, and I guess the
25 question is why didn't you, upon asking -- having been

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1 asked for it, just simply give it to them? I'm not sure
2 why -- we have talked about this before, and I --

3 MR. HORWICH: Right.

4 THE COURT: -- and it baffled me at the time, and
5 I thought this was being worked out, frankly, but
6 apparently not, and that's where we are today, and the
7 question is whether it is absolutely essential.

8 Of course, we are going to have to turn to
9 Mr. Bergmann for seeing where we go from here, but --

10 MR. HORWICH: It's a --

11 THE COURT: -- I'm curious about your resistance
12 to it.

13 MR. HORWICH: My resistance to this is that I
14 thought we had solved it as well when I received an
15 email from Mr. Bergmann saying that he had agreed that
16 the tax had been paid, and I -- that's in the record.
17 My further resistance to this is that although you have
18 correctly stated that it is not a huge burden, I'm doing
19 this case on a pro bono basis and spending more money to
20 get a tax return translated when there's \$3,800 at stake
21 and absolutely nothing turns on it, and I have provided
22 affidavits proving that we have done what we have done,
23 and the Government repeatedly told me they didn't need
24 any more documentation. I had had enough.

25 THE COURT: That's unfortunate.

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1 MR. HORWICH: Well, it is, but I'm in a situation
2 where I believe that I have done what was required to
3 meet my burden of proof on this and that the Government
4 had said that they did not need anything from me, and if
5 they turn around after discovery is closed and start
6 asking for things, it's -- as you say, it's unfortunate,
7 but I don't believe that it is -- I believe I have done
8 what has needed to be done, and I actually don't know
9 what else, given where we have gotten to, that I could
10 do without perpetuating this. I thought that we had
11 finished it.

12 THE COURT: Well, it's perpetuated, but,
13 Mr. Bergmann, when it's your turn, I guess I would like
14 you to address two of the questions that were just
15 raised. One is whether the Government -- whether you or
16 anybody on behalf of the Government indicated to
17 Plaintiffs' counsel that they didn't need any more --
18 did not need any more documents; and number two, whether
19 your request came after the close of discovery.

20 MR. HORWICH: With respect to the first one --
21 and to not embarrass Mr. Bergmann, because he did come
22 in a little later -- I can provide an email to that
23 effect, that the Government did not require documents.

24 THE COURT: Well, we will sort this out before we
25 leave here today.

24

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1 MR. HORWICH: Okay.

2 Second, the last point that I wanted to make is
3 that the Government has argued that there would be a
4 remand required to create rules associated with this.

5 THE COURT: To create what associated with --

6 MR. HORWICH: Well, the Government has made quite
7 a large argument about the fact that there would need to
8 be a series of rules of how to do this, how to allow a
9 treaty-based credit, and undoubtedly, if the Court rules
10 in the favor of the Plaintiffs in this case, there will
11 need to be at least an amendment to the foreign tax
12 credit form, and that is -- that would be expected.

13 However, the fact that the Government has not
14 created a series of rules does not stop me from working
15 this case. At the end of the day, in the absence of
16 rules, the parties agree more French tax was paid than a
17 combination of the U.S. normal tax and the NIIT. That
18 is sufficient.

19 And no matter what -- you know, I think we
20 default to do something reasonable, but I cannot come up
21 with any argument of how whatever the Government might
22 craft in terms of dealing with an extremely unlikely
23 scenario -- but it's tax, so there is always going to be
24 one or two things that could be a bit odd -- but when 99
25 percent of the time the situation is going to be as

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1 basic as did you pay more tax in France than your
2 ordinary income tax plus your NIIT, that is sufficient
3 for this case.

4 And in closing, Your Honor, the point of bringing
5 a case that was only for --

6 THE COURT: Well, don't move on that fast. What
7 rules have to be amended? You've said the form needs to
8 be amended. Forms are easy. What rules have to be
9 amended?

10 MR. HORWICH: I do not believe you would need to
11 do anything here besides include in the concept of what
12 is the United States tax that was paid, that you would
13 have to add a line and say what was the United States
14 NIIT that was paid -- what NIIT was paid.

15 THE COURT: So are you still talking about the
16 form or are you talking about a rule?

17 MR. HORWICH: Well, when you say a rule and a
18 form, I believe that one person's rule is another
19 person's -- amending a rule is --

20 THE COURT: Oh, there is a difference. There is
21 a difference, but --

22 MR. HORWICH: Well, I do not believe you need a
23 regulation.

24 THE COURT: That's what I'm asking.

25 MR. HORWICH: No, I do not believe you need a

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1 regulation. I think you can do this by simply amending
2 the form and having an explanation in it, and if you
3 really -- you could also do it by a notice.

4 THE COURT: Okay.

5 MR. HORWICH: So in final answer, the reason I
6 brought a \$4,000 refund suit, Your Honor, was
7 specifically to avoid any complications. Obviously, I
8 failed with respect to this one point, but the point of
9 avoiding this was this was a very straightforward way of
10 explaining -- of bringing -- of challenging this case,
11 and, as I say, I believe that I -- if the Court has more
12 questions, I would be happy to answer them or, indeed,
13 on reply after Mr. Bergmann has his turn.

14 THE COURT: Let me just take a look at my notes
15 here for a moment.

16 Tell me a little bit about -- in 26 USC 6511(d),
17 the phrase "against the tax imposed by," how does that
18 impact what your argument is? What's the significance
19 of that phrase?

20 MR. HORWICH: The significance of that phrase is
21 that in 6511(d), that is the provision in the Code which
22 allows for an extended statute of limitations in the
23 case of a foreign tax credit.

24 THE COURT: So we're past that issue?

25 MR. HORWICH: But there's a --

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1 THE COURT: There's a wrinkle?

2 MR. HORWICH: There's a wrinkle.

3 THE COURT: Yep.

4 MR. HORWICH: And the wrinkle is that it doesn't
5 say a foreign tax credit as allowed by Section 901. It
6 includes -- I'm afraid I don't have a copy of the
7 statute right in front of me --

8 THE COURT: Well, you should. If you're coming
9 to argue, you should have the things you need.

10 MR. HORWICH: Sorry. It says as well "treaty."
11 It says "by code or by treaty." So, in other words, the
12 Code recognizes that there is a wider claim, foreign tax
13 credit claim than merely by Code.

14 THE COURT: Okay. Let's reserve the rest of the
15 questions for after Mr. Bergmann in your reply.

16 MR. HORWICH: All right.

17 THE COURT: Thank you, sir.

18 Mr. Bergmann?

19 MR. BERGMANN: Good morning, Your Honor. May I
20 speak from here? Is that all right?

21 THE COURT: You may. You have multiple papers
22 with you and that's easier to access.

23 MR. BERGMANN: I thought so. Thank you.

24 Before I delve into my argument, I wanted to
25 answer a couple of the Court's questions that Your Honor

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1 had for Mr. Horwich that I can also I think provide
2 answers to.

3 THE COURT: Let's talk about the French
4 translation document.

5 MR. BERGMANN: Okay, we can start with that.

6 THE COURT: Let's start with that.

7 MR. BERGMANN: It is true that discovery closed,
8 and I'm not sure in terms of the timing of when I
9 made -- had exchanged emails with Mr. Horwich, whether
10 it was a couple weeks before or a couple weeks after the
11 discovery cutoff had happened, but I think it was after
12 the time that the Government could have served formal
13 discovery requests and have responses be due before the
14 discovery period had closed.

15 The Government's issue here with respect to the
16 computations in this case is not one that is based upon
17 needing documents from the Plaintiff that they have not
18 provided. What we asked for is for the Plaintiff to
19 demonstrate that when they computed the foreign tax
20 credits, when they computed their French tax, that they
21 properly took account of U.S. tax on the first bite that
22 applies to U.S. source investment income, and so it is
23 essential for a taxpayer, when properly applying the
24 three-bite rule, when they pay French tax in step two,
25 to make sure that they account for the U.S. tax that was

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1 due in step one.

2 And we asked the Plaintiff to -- really as part
3 of their burden of proof in their summary judgment
4 motion -- where we said, yeah, we agree you paid the
5 tax. You've given us sufficient evidence to show your
6 returns, but you haven't showed us that when you
7 computed the amount of French tax that you paid, that
8 you properly took account of the first bite of U.S.
9 income tax, and that's an issue that we believe is part
10 of their burden of proof.

11 And I think in our -- in the Government's cross
12 motion and response, we said you haven't shown that you
13 did this properly, and in their reply, they did not show
14 that they did it properly. And so in our final brief we
15 said they haven't shown that they did it properly.

16 We're not saying that, because they failed to
17 meet this burden of proof, that if Your Honor agreed
18 with them as a matter of law, that they should somehow
19 lose. We're just saying that if the Court were to agree
20 with them as a matter of law, that we have some work to
21 do which might just involve the Plaintiff showing us how
22 they specifically computed the dollar amounts of foreign
23 tax credits that were claimed on both their U.S.
24 foreign -- on their U.S. income tax returns and their
25 French income tax returns.

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1 THE COURT: So we are kind of in that proverbial
2 tennis match of burden of proof is what you're saying.

3 MR. BERGMANN: Yes, Your Honor.

4 THE COURT: And did you say you don't need any
5 more documents?

6 MR. BERGMANN: Yes.

7 THE COURT: And was this case bifurcated? The
8 answer is no.

9 MR. BERGMANN: No.

10 THE COURT: So the question is how we solve this.
11 I think the statement of not needing more documents
12 conceivably could cover not needing more documents
13 literally to prove whatever, including damages.

14 I also think that initially the burden of proof,
15 Mr. Horwich, to prove damages is on the Plaintiff. Do
16 you deny that?

17 MR. HORWICH: No.

18 THE COURT: All right. And so the question for
19 you, Mr. Horwich, is you didn't submit that. It is a
20 calculation necessity? Yes or no, Mr. Horwich?

21 MR. HORWICH: I think I gave the calculations
22 in --

23 THE COURT: You gave your own version of the
24 calculations, but did you give something to prove the
25 calculations? You are going to have to go through these

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1 steps to get to calculations --

2 MR. HORWICH: Yes.

3 THE COURT: -- or do you deny that?

4 MR. HORWICH: No. I would say that my affidavit
5 from Mr. Horton went through exactly how we --

6 THE COURT: Well, but he's asking for the -- not
7 your version. Attorneys can't testify. Documents can
8 testify. People can testify.

9 MR. HORWICH: Mr. Horton is an accountant. He
10 submitted an affidavit.

11 THE COURT: Well, I mean, then we have to get
12 Mr. Horton to come testify and say he looked at the
13 French tax treaty, too, but, you know, that doesn't
14 solve it really.

15 So, bottom line -- why don't you go ahead and be
16 seated. We are going to have to solve this, and I think
17 we have to solve it now, because for me to come to a
18 conclusion, I've got to have the ability to have the
19 Government look at the document, in all fairness.

20 And so how long is the document? You can sit
21 down for a minute. We are going to go back and forth
22 here for a moment and try to solve the problem, and then
23 we will get to the legal issues again.

24 How long is the document?

25 MR. HORWICH: If it's a French income tax

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1 return --

2 THE COURT: Right.

3 MR. HORWICH: -- it's several pages.

4 THE COURT: A guesstimate? I'm not going to hold
5 you to it.

6 MR. HORWICH: Fifteen.

7 THE COURT: Fifteen, all right. So that's not a
8 lot of translation, and half of it is probably numbers,
9 and even though they put the slash in the seven and
10 things like that, it probably isn't that hard to read
11 the numbers.

12 MR. HORWICH: The problem is that I submitted the
13 receipt that you get from the French Government that
14 goes through all of the same numbers, and I translated
15 it. Getting a tax return is not going to be helpful.

16 THE COURT: Well, my -- well, I don't understand
17 what you're saying. You translated it. I have had
18 other cases that involve translation, and generally
19 speaking, the Government has a right to do their own
20 translation whether they want to or not.

21 So the question to you, Mr. Bergmann, is when you
22 get that French document -- let's say you get it in
23 French -- would you do your own translation whether you
24 got a translation submitted or not? Generally the
25 Government is going to want to verify the translation

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1 anyway.

2 MR. BERGMANN: No, Your Honor. This is not a
3 question of whether we need a French translation. The
4 issue is there are numbers on the return, and we don't
5 know how that number was calculated, and we want to make
6 sure, when the number was calculated, that they properly
7 applied the three-bite rule.

8 THE COURT: So do you need a translation?

9 MR. BERGMANN: No, ma'am. No, Your Honor.

10 THE COURT: Just the document?

11 MR. BERGMANN: Just need an explanation for how
12 the number was reached on the -- the number that appears
13 on the document, how it was computed, the foreign tax
14 credit numbers, and we asked for that by email. It's
15 something that I believe is an essential part of their
16 burden of proof and in order to demonstrate that they're
17 entitled to --

18 THE COURT: Let's get away from burden of proof
19 for a moment and try to solve this.

20 MR. BERGMANN: Okay.

21 THE COURT: And if we can't, I'll solve it for
22 you, but why, Mr. Horwich, would you not just hand it
23 over since what they're looking for is the numbers and
24 are not asking for a translation?

25 Now, if they decide at the government level to do

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1 a translation, that's their problem. So you're not
2 going to be paying for a translation here. According to
3 Mr. Bergmann, he doesn't want that.

4 Is that correct?

5 MR. BERGMANN: That's correct.

6 THE COURT: All right. So why not hand it over?

7 MR. HORWICH: I will hand it over.

8 THE COURT: Lovely. And then we can supplement
9 the record so that we have it as well.

10 MR. BERGMANN: Sure.

11 THE COURT: And, although perhaps dangerous, I
12 read enough French that I probably could even translate
13 it, but I won't do a translation on my own. If I have a
14 problem, I'll come back to you-all.

15 MR. BERGMANN: And I am glad to work with
16 Mr. Horwich offline to make sure that we're comfortable
17 with the evidence that he's able to establish as to how
18 the numbers were computed.

19 THE COURT: Okay. Let's get that, Mr. Horwich.
20 How much time do you need? You are obviously not in
21 your office.

22 MR. HORWICH: I will be back in my office on
23 Monday. Mr. Bergmann will have it on Tuesday.

24 THE COURT: Excellent. Problem solved. Thank
25 you, gentlemen.

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1 All right. Let's get to the legal issues. You
2 wanted to address a couple things first. We can start
3 with that.

4 MR. BERGMANN: Yes, of course. Your Honor had
5 asked whether there were other cases involving the net
6 investment income tax and whether foreign tax credits
7 may be claimed against that tax.

8 THE COURT: Do they also involve the NIIT is
9 really part of the problem.

10 MR. BERGMANN: Yes. The Toulouse case is the
11 only case where there's a published opinion involving
12 the NIIT.

13 THE COURT: Right.

14 MR. BERGMANN: I am aware that fairly recently,
15 maybe a month or two ago, a taxpayer, whose name I do
16 not presently recall, filed a claim in the Central
17 District of California, the U.S. District Court, in a
18 case that did not involve France, but I understand --
19 secondhand, I have not read the complaint --

20 THE COURT: Right.

21 MR. BERGMANN: -- that the complaint involved
22 claims that the net investment income tax -- that tax
23 credits should be allowed against it not under an income
24 tax treaty but under a totalization agreement with the
25 relevant company.

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1 THE COURT: Can you get us the name of that and
2 Mr. Horwich as well?

3 MR. BERGMANN: I can. I would have to provide
4 that to Your Honor's Law Clerk after we are finished at
5 the hearing today.

6 THE COURT: That's perfectly fine, and a copy to
7 Mr. Horwich as well.

8 MR. BERGMANN: Yes, I will be glad to do that.

9 THE COURT: All right.

10 MR. BERGMANN: My understanding is that that case
11 is at the very earliest stages and does not involve
12 France --

13 THE COURT: Right, and may or may not be relevant
14 is what we're saying --

15 MR. BERGMANN: Yes.

16 THE COURT: -- but give it to us and we will make
17 that decision.

18 MR. BERGMANN: Yes. For the purpose of
19 completeness, I thought I would let the Court know.

20 THE COURT: That's fine. Okay.

21 MR. BERGMANN: And then I guess one other thing
22 to talk about with respect to the computational issues
23 before we dig into the legal questions, on pages 35 to
24 37 of the Government's brief, we identified a number of
25 computational problems that would occur if this Court or

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1 any other court were to determine that the net
2 investment income tax was subject to foreign tax
3 credits, contrary to the provisions of the United States
4 Code.

5 There are many of them --

6 THE COURT: All right, let's stop right there.

7 What do you mean by "contrary to the U.S. Code"?

8 MR. BERGMANN: Well, the U.S. Code provides
9 specifically that foreign tax credits are only allowed
10 against the taxes under Chapter 1.

11 THE COURT: That's the Chapter 1 argument we are
12 going to get to?

13 MR. BERGMANN: Yes.

14 THE COURT: Okay.

15 MR. BERGMANN: Yes. And the one that I think is
16 the easiest to explain is the one that I elaborated on
17 the most on pages 35 to 36 of the brief, which is a
18 fairly simple example. If I am -- the net investment
19 income tax is the lesser of two sides. It's either --
20 it's the amount over \$250,000 or the total amount of
21 net -- of gross income or the total amount of net
22 investment income.

23 So if, for -- and then you have the problem of
24 what happens if your investment income -- if half of it
25 is from one country and half of it is from another. So

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1 we could take a hypothetical example -- and I have to in
2 this case in order to show the problem -- of a taxpayer
3 in France that has \$300,000 of total income, all of it
4 being investment income, half of it being from the
5 United States source and half of it being French source.
6 That hypothetical taxpayer would pay a net investment
7 income tax on \$50,000 because the -- it -- because
8 the -- it would be the amount over \$250,000 of the
9 taxpayer's total income.

10 In that case, how do we then determine what
11 portion of the \$50,000 is U.S. source or French source?
12 There are no rules that exist that would -- that
13 demonstrate how that would occur, and the reason is, in
14 our -- in the Government's view, that's because Congress
15 never intended for this to be subject to foreign tax
16 credits. So the Code doesn't provide any rules for how
17 to do this, and there is no regulations or other
18 administrative guidance that would show how to do this.

19 Now, that's a simple example, but there are
20 numerous other complicated examples that occur in the
21 foreign tax credit world involving the method of
22 applying cross-crediting under Section 904 limitations;
23 there are complexities with respect to carry-forwards
24 and carry-backs of foreign tax credits from one year to
25 another; and there are even further complexities when a

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1 taxpayer has a loss, an investment loss in a later year,
2 and then they can carry back the loss from one year to
3 the other, and how would those rules work in those
4 circumstances.

5 And while this particular Plaintiff may not
6 necessarily raise those issues, the tax world is an area
7 that is subject to great mischief and very creative
8 accountants, and the Service has to apply a scheme, a
9 framework for applying law cognizant of the fact that
10 there are all of these wrinkles that can happen.

11 And so that's one of the reasons why we suggest
12 that Congress may very well have decided not to make the
13 net investment income tax subject to foreign tax credits
14 because there are all these problems, but if the Court
15 were to determine that there's a treaty-based credit
16 that is independent of the Code, we respectfully suggest
17 that in that circumstance we might have to have further
18 briefing in order to discuss what proper framework would
19 apply to this particular Plaintiffs' circumstances.

20 THE COURT: All right. Let me ask you a couple
21 questions about that. Further briefing is not a
22 problem, of course, and I'm not suggesting I want to
23 sort of carry this on and on and on, but unfortunately,
24 sometimes we do find ourselves in that position, and
25 that's a possibility even if I, after hearing your

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1 arguments, going back and rereading the briefs, have
2 further questions for you, and you would get further
3 briefing anyway. So I'm not -- I don't want to do that
4 necessarily, but that's always a possibility.

5 The part that I'm having a little more trouble
6 with, aside from the comment about creative mischievous
7 accountants -- you kind of insult my father that way,
8 but that's okay --

9 MR. BERGMANN: My apologies.

10 THE COURT: No, I'm just kidding.

11 -- but the real issue I'm having here is statutes
12 are passed all the time, and then there is an enabling
13 regulatory development, so that doesn't indicate -- the
14 fact that there are no rules on how to do it to me at
15 least I don't think indicates that there was an intent
16 of Congress not to need those rules and not to, you
17 know, have something happen here. I think that's a
18 pretty far-flung argument. Why isn't it?

19 MR. BERGMANN: Well, we are somewhat hamstrung
20 here by the fact that net investment income tax was
21 passed in a hurry at the end of the Affordable Care Act,
22 so there's not much legislative history.

23 THE COURT: Right.

24 MR. BERGMANN: We do have what is we believe a
25 clear manifestation of congressional intent, that it

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1 should be put in a new chapter of the Code, that it's --
2 they created a brand new chapter, Chapter 2(a), when
3 they could have shoved it into another chapter or --

4 THE COURT: But you could argue that that was
5 because of things other than the tax rules but more
6 COVID-driven, what are the -- or time-driven,
7 process-driven. Congress enacts statutes in funny ways
8 and tucks statutes in funny places all the time.

9 MR. BERGMANN: That is true, although in this
10 case the fact that it was put in a new chapter has
11 significant effects on the Internal Revenue Code.

12 THE COURT: No, I understand. I don't know where
13 I come out on this, honestly. I'm just kind of pushing
14 questions.

15 MR. BERGMANN: Yes.

16 THE COURT: Don't ever read into my questions a
17 result, because we really do go back afterwards and look
18 at everything all over again, and what we're really
19 doing is asking questions that are the first pass
20 through the information that's provided by counsel.

21 So I'm not sure I can go there, having done,
22 among other things in my career, regulatory development
23 with very little direction from statutes, and so I'm a
24 little bit troubled by that argument and the
25 implications of that argument. I know this is a case of

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1 first impression probably as well in the Court, but that
2 to me would be an almost bigger mental leap, to buy that
3 argument.

4 MR. BERGMANN: I understand Your Honor's
5 reluctance. I would just say that, you know, we are
6 attempting to find an explanation for the decision to
7 put it in Chapter 2(a), and this we believe is a
8 plausible explanation.

9 THE COURT: I always award creativity, so you get
10 the E for effort, but I'm not sure you get the argument.

11 MR. BERGMANN: Well, then, I will move on, Your
12 Honor.

13 THE COURT: All right.

14 MR. BERGMANN: But just with respect to the
15 computational point, I think it may -- if the Court were
16 to determine that they are entitled to a treaty-based
17 credit that is independent of the Code, that it might be
18 necessary -- that it might be appropriate -- but subject
19 to the Court's desires, of course -- to make a decision
20 on the legal issues and then ask the parties to then
21 cooperate on computations, or if there is a way for us
22 to then -- if we had some disagreement, we could then
23 attempt to brief the computational issues separately.

24 THE COURT: Well, the obvious answer is try to
25 settle it.

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1 MR. BERGMANN: Yes, although settle it subject to
2 the our right to appeal the legal decision, I would
3 guess.

4 THE COURT: So would the Government --
5 assuming -- and I -- really, do not read into this,
6 because I am still up in the air on the ultimate result.
7 I have a lot more thinking to do.

8 But would the Government object to entering a
9 judgment for the \$3,851 -- the 3,000 or almost 4,000
10 dollars? There's a number in the complaint. It's a
11 very specific number, \$3,851 and no cents. Would the
12 Government object to a judgment in that number or --

13 MR. BERGMANN: Yes, absent additional proof from
14 the Plaintiff and --

15 THE COURT: Well, assuming you're getting the
16 French tax return, would you still object?

17 MR. BERGMANN: Yes, because we would then have to
18 make sure that, as a computa -- there are computational
19 issues that the Service has not been required to address
20 as to how the net investment income tax would be
21 computed if -- how the tax credit against the NIIT would
22 have been computed if the Court were to determine that
23 there was a treaty-based credit that is --

24 THE COURT: All right. So what I would probably
25 do in that case, subject to talking about it at the time

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1 if the Plaintiff prevails on the legal issues, is
2 probably give you a period of time to do that and -- but
3 it won't be a very long one --

4 MR. BERGMANN: Understood.

5 THE COURT: -- and then enter judgment, of
6 course, subject to your right to appeal, of course.

7 MR. BERGMANN: Yes, of course.

8 THE COURT: I'm assuming the Government will
9 appeal this case if they lose, and the Plaintiff will
10 appeal if the Plaintiffs lose, so we're operating under
11 that assumption anyway in a case like this.

12 MR. BERGMANN: Yes. As I often am required to
13 say when I'm asked whether the Government will appeal,
14 and as I --

15 THE COURT: You are not in the Solicitor
16 General's office --

17 MR. BERGMANN: Yes, exactly.

18 THE COURT: Got it.

19 MR. BERGMANN: Okay, thank you.

20 THE COURT: All right.

21 MR. BERGMANN: Okay. So now moving on to the
22 legal argument, this is a straightforward case
23 concerning the interpretation of a tax treaty. Article
24 24-2(a) of the U.S.-France income tax treaty provides
25 for a foreign tax credit against the United States

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1 income tax but only if in accordance with or subject to
2 the limitations of United States law.

3 The Internal Revenue Code does not allow
4 taxpayers to claim foreign tax credits against the net
5 investment income tax, which Congress chose to put in
6 Chapter 2(a) of the Code rather than Chapter 1, and
7 Section 901(a) of the Code allows foreign tax credits
8 only against taxes imposed under Code Chapter 1.

9 Thus, Article 24-2(a), by its terms, does not
10 provide taxpayers with a basis for claiming tax credits
11 that is independent of the Code. The language that I'm
12 referring to, the "in accordance with," "the provisions
13 of," and "subject to the limitations of U.S. law"
14 language, this is the same language that Your Honor
15 relied upon in the Snap-On Tools case --

16 THE COURT: That's a long time ago.

17 MR. BERGMANN: It was a while ago, yes.

18 THE COURT: That was the beginning of my career.

19 MR. BERGMANN: -- to hold that the Government's
20 position in that case, which was one that argued that
21 the treaty was incon -- overrode the provisions of the
22 Code, and Your Honor relied on that language and said
23 no, no, no, that's not right. This treaty provision
24 says "subject to the provisions of the Code."

25 THE COURT: You never know whether I've matured

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1 since then.

2 MR. BERGMANN: I'm sure Your Honor has.

3 THE COURT: I hope so.

4 MR. BERGMANN: It's the same language that we're
5 asking the Court to apply here.

6 Now, in arguing otherwise, these Plaintiffs seek
7 a unique benefit that would put them and other U.S.
8 taxpayers residing in France in a better position than
9 U.S. taxpayers residing in the United States. That is
10 because U.S. taxpayers residing in the United States may
11 be required to pay two different taxes on the same
12 dollar of investment income, both the general U.S.
13 income tax under Chapter 1 of the Code and the net
14 investment income tax under Chapter 2(a) of the Code.

15 I myself, together with my wife, on a joint
16 return last year paid multiple taxes, both a net
17 investment income tax and the general income tax on
18 dollars of investment income. Many other people that
19 are U.S. citizens residing in the United States are in
20 the same exact position.

21 Under the Government's position here, a U.S.
22 citizen residing in France could also be subject to two
23 levies on the same dollar of investment income, both the
24 regular French income tax, subject to tax credits, and
25 the U.S. net investment income tax. They're in the same

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1 position that U.S. citizens are. They're paying
2 multiple levies on the same dollar of investment income.

3 But here, under the Plaintiffs' interpretation,
4 they and others like them would be in a better position
5 than the United States, because under his argument, the
6 net investment income tax would also be eaten up by
7 foreign tax credits and, thus, they would only pay one
8 levy on their income -- on their net investment income.

9 So for them to suggest that there is a double
10 taxation policy implication involved in this case is
11 simply wrong because they are the ones that are asking
12 for a benefit that is not the same as that that anyone
13 in the United States would have to pay. We don't refer
14 -- it's not double taxation, because double taxation has
15 a meaning, a particular meaning under international tax
16 treaties, but it is what I would call multiple taxation.
17 There are multiple levies imposed on the same dollar of
18 income, and the fact that they would be required to pay
19 multiple levies on the same dollar of income does not
20 put them at a disadvantage vis-à-vis similarly situated
21 taxpayers in the United States.

22 The Government asks the Court to apply the treaty
23 as written and deny Plaintiffs this benefit to which
24 they are not entitled. The text of Article 24-2(a),
25 which is quoted on page 21 of the Government's opening

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1 brief, is clear. It provides for the allowance of a tax
2 credit against the United States income tax only in
3 accordance with the provisions of and subject to the
4 limitations of the law of the United States.

5 As the Tax Court held in the Toulouse opinion,
6 the requirement that the foreign tax credit must be in
7 accordance with the Code means that the Code must
8 provide the credit if one exists, and as we've said,
9 because Congress put this in Chapter 2(a) and limited
10 the application of foreign tax credits to taxes under
11 Chapter 1, Congress provides expressly that the credits
12 are not allowed against the net income tax.

13 Now, the Plaintiffs make various arguments in
14 response, and I'll go through them one by one. First
15 they argue that the parenthetical inside Article 24-2(a)
16 requires that the laws of the United States --
17 recognizes that the laws of the United States may be
18 amended over time and that U.S. law, as amended, would
19 continue to apply so long as such amendments did not
20 interfere with the general principle hereof.

21 Well, the treaty doesn't say what the general
22 principle hereof is, what it means. Now, the Treasury
23 Department's technical explanation does. It says that
24 the general principle, as explained by the technical
25 explanation, refers to the allowance of a credit. Thus,

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1 while the United States may not outright repeal the
2 foreign tax credit framework from the Code, it has wide
3 leeway to decide the extent to which to allow the credit
4 and any conditions to attach to it, and as I think both
5 parties agree, U.S. executive interpretations of treaty
6 language are entitled to great weight under the Supreme
7 Court opinion in Sumitomo Shoji America.

8 Let me digress now to talk about the shared
9 expectations issue which I think Your Honor discussed
10 with Mr. Horwich earlier. There is case law which
11 suggests that the job of the courts is to attempt to
12 divine the parties' shared expectations when the courts
13 interpret treaty language. This broad language
14 regarding shared expectations is really regarding treaty
15 interpretation of all treaties, not just tax treaties.

16 Tax treaties are different in certain
17 circumstances, and I -- the Kaiser article from -- that
18 we -- the law review article that we cited in our papers
19 describes some of this. Tax treaties frequently contain
20 a provision called Article 3-2, which is a provision
21 that appears in the French treaty. It's one that says,
22 "Where a treaty contains undefined terms, under Article
23 3-2, you apply the law of the country whose taxes are at
24 issue in order to determine what that term means," which
25 expressly recognizes that there can be a treaty where

1 one country thinks it means one thing and the other
2 country thinks it means something completely different,
3 and each country gets to apply its own interpretation of
4 the treaty to the application of its own tax.

5 So to suggest that all tax treaties that -- when
6 one is interpreting those treaties, it is an exercise in
7 divining the shared expectations of the parties is
8 inconsistent with the way many tax treaties are drafted,
9 including this particular tax treaty between the United
10 States and France.

11 And many of the cases that refer to a shared
12 expectations standard in the tax treaty context involve
13 treaties that don't include a provision of Article 3-2,
14 or they involve the interpretation of provisions in tax
15 treaties that do not constrain the sovereign power of a
16 country to impose tax.

17 They -- so there are cases that involve the
18 interpretation of the mutual assistance provisions of
19 treaties. These are the treaties -- these are the
20 provisions that require one country to assist another
21 country with an exchange of information. Those
22 particular provisions and interpretations of those
23 provisions aren't constraining the sovereign right of a
24 Government to tax, and so I think it is one thing -- and
25 I think there are also separation of powers issues that

1 are at stake here, where if -- if one assumes that there
2 is an ambiguous provision of a treaty, the question is,
3 who should be the arbiter of determining what that
4 means? Should this Court or any other court be allowed
5 to tell the Executive Branch, "I think this ambiguous
6 term means X instead of Y," or should the Executive
7 Branch be allowed to apply their own interpretation
8 subject to the right of the foreign country to object in
9 an appropriate manner and forum, either in connection
10 with further negotiations on the treaty?

11 There's also a process that's in place. If
12 France were to disagree with the United States' view
13 about whether net investment income tax should be
14 subject to foreign tax credits, there's a competent
15 authority procedure that is in place that allows the
16 Government of France, through the French Competent
17 Authority, to send a request for information -- to send
18 a request to the U.S. Competent Authority to say what
19 this -- what's -- why are you applying this tax? We
20 disagree.

21 And there's a process that can occur in that
22 circumstance that would allow the two nations to resolve
23 their differences, and this, indeed, is a process that
24 these Plaintiffs themselves could have started by filing
25 an application with the French Competent Authority and

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1 seeking to ask France to pursue their position on their
2 behalf in negotiations with the United States, a process
3 that, as far as we know, they never undertook.

4 THE COURT: So let me ask you that. I understand
5 that that's an available avenue of helping resolution in
6 cases like this. The absence of doing it, though, where
7 does that leave us? It wasn't done as I understand it.
8 Is that correct?

9 MR. BERGMANN: Yes, that's correct.

10 THE COURT: All right. And, I mean, we do the
11 deference argument all the time. Any regulatory-based
12 case, we have that argument that's inherent in the case,
13 comes from the Government, usually articulated -- not
14 always -- but it's there, that if an agency interprets
15 its own regulations, there is a certain amount of
16 deference up to a point.

17 MR. BERGMANN: Yes, that's true.

18 THE COURT: So is the "up to the point" here the
19 words of the treaty?

20 MR. BERGMANN: Yes. It's the words of the
21 treaty. We believe that the parenthetical, "the general
22 principle hereof," that language, that is an ambiguous
23 term. If Your Honor were to believe that "the general
24 principle hereof" was completely unambiguous, that it
25 somehow reflected a meeting of the minds between the two

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1 countries as to exactly what that meant, in that case,
2 it might be possible for this Court or another court to
3 determine that that should -- that that should apply.

4 THE COURT: So is your argument, then, from a
5 strictly legal perspective, that if certain key words
6 are ambiguous, then deference has a higher value or an
7 absolute value? Which is it?

8 MR. BERGMANN: I think it has an absolute value,
9 yes, Your Honor. I -- and, in part, it's hard for me to
10 avoid -- I guess I don't want to be categorical here and
11 say that if the Court determined that this treaty has a
12 plain meaning that is somehow inconsistent with the
13 intent of the United States, that the Court must apply
14 the plain meaning as opposed to what the United States'
15 executive opinion is, because treaty interpretation is
16 not the same as statutory interpretation.

17 THE COURT: So what's the difference? Where do
18 you see the difference?

19 MR. BERGMANN: Well, the difference is in
20 connection with the liberality principle that was being
21 discussed --

22 THE COURT: Right.

23 MR. BERGMANN: -- that treaties are interpreted
24 broadly through the use of extrinsic materials because
25 they are frequently ambiguous, and they are devices

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1 essentially that help countries determine differences
2 between themselves, and they're often not models of
3 clarity.

4 THE COURT: Just like statutes.

5 MR. BERGMANN: Yes, but the difference is that --

6 THE COURT: They're mediated results in the same
7 way.

8 MR. BERGMANN: Yeah, although the Supreme Court
9 jurisprudence draws distinctions between the way that
10 one determines treaties and statutes, and, you know, in
11 present-day jurisprudence, as Your Honor and I, I think,
12 have both seen over the years, is moving more in the
13 direction of plain text and plain meaning
14 interpretations of statutes and is eschewing legislative
15 history and other interpretive tools that courts might
16 have been more willing to consider in the past.

17 THE COURT: It depends on who you talk to.

18 MR. BERGMANN: No, I understand that, but as one
19 who's briefed a number of these issues in front of a
20 number of the newer judges in this Court and others, I
21 have seen greater reluctance on behalf of courts to
22 apply interpretive tools to ascertain the intent of a
23 statute.

24 THE COURT: But at the end of the day,
25 interpretive tools can be used if there's nothing else,

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1 and even some of those people are going to use them,
2 so --

3 MR. BERGMANN: I think that's true, yeah --
4 THE COURT: -- I mean, I think it's still a
5 mixture.

6 MR. BERGMANN: But all I'm saying is that where
7 statutory interpretation might be making somewhat of a
8 left turn in jurisprudence, treaty interpretation is
9 not, and it is actually probably taking more of a right
10 turn in terms of the willingness of courts to look at
11 tools outside of the plain text of a treaty in order to
12 determine --

13 THE COURT: I've never been one to follow the
14 crowd, so that doesn't work so much.

15 MR. BERGMANN: Well, perhaps I can get an E for
16 effort, although I don't want to --

17 THE COURT: I think -- I mean, the bottom line is
18 it comes down to each individual case --

19 MR. BERGMANN: Yes.

20 THE COURT: -- and how it goes. You know, all of
21 us probably have a predilection one way or the other,
22 but -- and some more reluctance to use interpretive
23 materials than others, but it has to come down to the
24 individual case.

25 MR. BERGMANN: Yes. And in this case in

1 particular, Your Honor, the interpretive materials are
2 clear. At least there is a U.S. Treasury explanation of
3 this treaty and the Treasury explanations of the model
4 treaties, which say this language, the general
5 principle, that just refers to the allowance of a
6 credit, not, broadly speaking, some concept that a
7 credit must be allowed against any tax or any United
8 States income tax under -- under the terms of the
9 treaty, and there is no -- so we have U.S. executive
10 materials that provide an interpretation of that.

11 We have no French materials that would provide a
12 contrary interpretation for that, and, in fact, the fact
13 that the U.S. treaty was then re-enacted with amendments
14 and the two protocols after the technical explanation
15 was published demonstrates or one could infer an
16 acquiescence in France from those -- the -- from the
17 enactment of those protocols, as I think the -- there's
18 an Adams case that we cited in our -- a Tax Court case
19 we cited in our papers that drew us to that conclusion.

20 One last thing on expectations and the extrinsic
21 authority point, Mr. Horwich in his argument said that
22 all extrinsic authority predates the net investment
23 income tax, and that is true in all cases but one.
24 There is actually one piece of extrinsic authority that
25 does post-date the enactment of the net investment

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1 income tax, and that is the preamble to the U.S.
2 Treasury regulation that adopted rules in connection
3 with the application of the net investment income tax
4 and the preamble language stating that -- and, again,
5 published by the Treasury Secretary in the Federal
6 Register --

7 THE COURT: And do you have a cite?

8 MR. BERGMANN: Yes, Your Honor.

9 THE COURT: I just want to -- I try to keep the
10 record pretty tight in a case that I -- not in --
11 actually, in all cases, but particularly when I know
12 there's going to be an appeal so that it's easily
13 perceived.

14 MR. BERGMANN: Yes. It's Treasury Regulation
15 Section 1.1411-1 --

16 THE COURT: All right. You are going way too --
17 1 --

18 MR. BERGMANN: 1.1411-1, and it is actually
19 the -- the preamble of the -- the preamble to those
20 regulations are in final regulations under 78 Federal
21 Register 72394-01, and that is cited on pages 30 to 31
22 of the Government's opening brief.

23 THE COURT: Okay. So let's talk a little bit
24 about regulatory interpretation. Preambles are
25 different from the actual regulation portion.

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1 MR. BERGMANN: They are.

2 THE COURT: So does that weaken your argument to
3 some extent?

4 MR. BERGMANN: Well, we are not arguing that this
5 is entitled to Chevron deference.

6 THE COURT: Right.

7 MR. BERGMANN: We are arguing that this is
8 entitled to great weight as an Executive Branch
9 interpretation of a treaty.

10 THE COURT: Right. I just want to make sure that
11 we're on the same page.

12 MR. BERGMANN: Yes.

13 THE COURT: Okay.

14 MR. BERGMANN: And so this, I think, is as
15 authoritative or potentially even more authoritative
16 than the Treasury Department technical explanations
17 because this preamble was approved by the Treasury
18 Secretary for publication, and the preamble contains the
19 following language:

20 "If a United States income tax treaty contains
21 language similar to that in paragraph 2 of Article 23 of
22 the 2006 United States Model Income Tax Convention" --
23 and parenthetically, that's the same thing as Article 24
24 of the U.S.-France Income Tax Convention, if it does --
25 "which refers to the limitations of United States law,

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1 which includes Sections 27(a) and 901, then such treaty
2 would not provide an independent basis for a credit
3 against Section 1411 tax."

4 We respectfully submit that this is entitled to
5 great weight as an interpretation by the Executive
6 Branch of this particular treaty, and this
7 interpretation postdates the enactment of the net
8 investment income tax.

9 So I've discussed our response to the Plaintiffs'
10 reliance on the parenthetical. Now the Plaintiff makes
11 an argument that all covered taxes under the treaty
12 should be the same as all credible taxes under the
13 treaty. He essentially tries to conflate the two. He
14 says that if it's a U.S. income tax, a credit must be
15 allowed against it. Well, that is inconsistent with the
16 way the treaty was written.

17 The treaty provides in Article 24-1 for foreign
18 tax credits for U.S. tax against French tax, and Article
19 24-2 governs foreign tax credits against U.S. tax. The
20 two are different, and they're not necessarily the same.

21 And so by its terms, Article 24-2 says "subject
22 to the limitations -- in accordance with the provisions
23 of and subject to the limitations of U.S. law." It's
24 the Government's view that that incorporates all of the
25 provisions of the Internal Revenue Code that limit the

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1 application of foreign tax credits.

2 Article 24-1, which is the reverse, which is
3 credits for U.S. tax against French income tax, does not
4 contain similar language. So by its terms, Article 24-1
5 does not require that the relevant U.S. tax must be
6 offset by foreign tax credits under the Code to be
7 creditable against the French income tax.

8 So while Mr. Horwich suggests that there should
9 be some reciprocity factor that the Court should apply
10 to make sure that the two are co-extensive with each
11 other, that's not something that France asked for when
12 it negotiated this treaty, and while Plaintiffs
13 correctly note that there are treaties where the United
14 States agreed with other countries to override
15 provisions of the U.S. Code -- the Denmark treaty, for
16 example -- they specifically here provide that foreign
17 taxes may be creditable contrary to the provisions of
18 the U.S. Code. Those treaties did that explicitly.
19 This was a specific negotiated term between the United
20 States and the other countries.

21 And the fact that they did so in those treaties
22 and that there is no specific language here, I mean, the
23 contrast is telling. The United States and France did
24 not negotiate a departure from the provisions of the
25 U.S. Code in this treaty.

1 Finally, the Plaintiff argues that there is some
2 broad purpose of the treaty to reduce double taxation
3 and the Court must construe the treaty in order to do
4 so; however, while the reduction or elimination of
5 double taxation may be a general goal of the treaty, the
6 treaty must be enforced as it's written, and as it's
7 written, the tax credits are only allowed in accordance
8 with the provisions of and subject to the limitations of
9 United States law.

10 And as we explained in our reply brief, this and
11 many other treaties have multiple purposes, both the
12 reduction and elimination of double taxation, as well as
13 the prevention of fiscal evasion. Those multiple
14 purposes frequently work at cross-purposes with each
15 other. And so to suggest that the avoidance of double
16 taxation must trump all other potential purposes under
17 the treaty we believe is an overstatement of what the
18 parties had intended.

19 And there are numerous conditions and limitations
20 in the Code, all of which work against the policy
21 against double taxation, yet they are still enforced,
22 and Plaintiff does not suggest that they should not be
23 enforced. They agree that they should be enforced. So
24 to suggest that there is some -- that the Court should
25 go out of its way to construe the treaty in Plaintiffs'

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1 favor because of this purpose we believe is incorrect,
2 and, in particular, as I earlier explained, would give
3 these particular Plaintiffs and others that are like
4 them a benefit that is beyond that that the United
5 States gives to its own taxpayers that live in the
6 United States.

7 With respect to the liberal construction
8 discussion, I will only add that while the liberal
9 construction in recent Supreme Court jurisprudence only
10 means that courts should consider broad interpretive
11 tools when they construe treaties, not necessarily that
12 treaties should always be construed in favor of the
13 most -- of granting the most benefits to one party or
14 the other, and the Fifth Circuit opinion that we
15 referenced in the Kreinerman case, cited on pages 9 to
16 10 of our reply, I think makes this clear. And also,
17 it's even more so in tax treaties, again, where we are
18 talking about constraining the sovereign power of the
19 United States to impose tax.

20 Again, we would respectfully suggest that
21 separation of powers concerns are at issue and that for
22 that reason this Court and other courts should construe
23 ambiguous language in tax treaties narrowly in the
24 Government's favor, leaving, of course, the other
25 contracting party -- putting them in a position to

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1 pursue relief with the United States through various
2 means if they would choose to do so.

3 THE COURT: Why does that operate differently
4 with tax issues than it does with any other issue which
5 the United States has the sovereign power to do?

6 MR. BERGMANN: I think because tax is a core
7 sovereign power of the Government, whereas others might
8 not be. I think in our reply brief we cited some -- I
9 guess some "golden oldies" for lack of a better word,
10 Supreme Court cases for that proposition.

11 THE COURT: Yeah, I saw it in your brief, and I
12 kind of raised an eyebrow then a little bit, but --

13 MR. BERGMANN: Well, frequently I can find good
14 authority if I go back to 1888, and actually, when
15 you're briefing sovereign -- sovereign cases --

16 THE COURT: You can go back pretty far, yes.

17 MR. BERGMANN: -- there is good U.S. Supreme
18 Court authorities from the 1860s to 1880s that really
19 talk about the importance of taxation as part of the
20 Government's sovereign powers.

21 THE COURT: Right.

22 MR. BERGMANN: Mr. Horwich did not discuss his
23 second argument, which involves Article 24-2(b) in his
24 argument. I'm perfectly happy to stand on our briefs in
25 connection with that argument unless the Court had any

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1 questions about it. This is the provision of the Code
2 that follows the one that we -- not of the Code, of the
3 treaty that follows the one we have just been
4 discussing.

5 THE COURT: Right.

6 MR. BERGMANN: And as we explained in our briefs,
7 both our opening brief and our reply brief, that Article
8 24-2(b) is part of an ordering rule established by the
9 treaty, and it implements the three-bite rule, and it
10 does not create an independent tax -- an independent tax
11 credit separate and apart from the tax -- anything that
12 would be allowed under Article 24-2(a). The two have to
13 be read in context with each other.

14 THE COURT: When you say 2, the (a) and (b)?

15 MR. BERGMANN: (a) and (b), yes.

16 THE COURT: Yeah.

17 MR. BERGMANN: And this one -- I'll be glad to
18 discuss it more, and if Mr. Horwich wants to argue about
19 it, perhaps I can come back and talk about it more, but
20 I will say this is a big one for the Government. If the
21 Court were to construe that 24-2(b) created some
22 independent right to a foreign tax credit that was
23 unmoored from the provisions of the Internal Revenue
24 Code, then that would essentially allow taxpayers
25 everywhere in every country where a similar provision

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1 exists to claim foreign tax credits that are not limited
2 by the cross-credit limitations under the Code, by
3 Section 904, by Section 911. We believe that that
4 result would be just so far out of the norm that it's
5 unsupportable in law, but, again --

6 THE COURT: How important to a Plaintiff's
7 success in this case is -- do you perceive the
8 disengagement of (a) and (b) argument to be?

9 MR. BERGMANN: I'm not sure what --

10 THE COURT: Without that disengagement of (a) and
11 (b), can the Plaintiff win?

12 MR. BERGMANN: Without the disengagement, can --
13 I'm confused by Your Honor's question.

14 THE COURT: Well, you've said it's -- you don't
15 think -- you think they have to be read together.

16 MR. BERGMANN: Yes.

17 THE COURT: If they were not to be read together,
18 can the Plaintiff succeed?

19 MR. BERGMANN: If they were not to be read
20 together, then the -- that provision might literally
21 provide for a foreign tax credit against the net
22 investment income tax and any other tax that is
23 completely unlimited by any provisions of the United
24 States Code.

25 THE COURT: No, I understand that part of your

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1 argument.

2 MR. BERGMANN: Yes, we would -- even in that case
3 we would argue that it is -- that that is so contrary to
4 the technical explanations, both to this treaty and to
5 the model treaties, and it is also -- would render -- I
6 mean, would render surplusage the -- the reference in
7 Article 24-2(b) to the Section 904 limitations and, in
8 particular, to the re-sourcing of U.S. income to French
9 income, that it -- and that -- we would still argue that
10 those would compel the Court to conclude that no foreign
11 tax credit should be allowed under that provision.

12 But, again, it's hard for me to -- some of those
13 are arguments that are reasons why the Court should have
14 to read them together, and so I'm -- Your Honor is
15 hypothesizing a scenario where you're going halfway down
16 a road and -- a road that we don't think it would be
17 appropriate for the Court to go down and --

18 THE COURT: I understand that.

19 MR. BERGMANN: Yes.

20 THE COURT: I understand that it's a very
21 important argument for the Government.

22 MR. BERGMANN: Yes.

23 THE COURT: But my question still is, can
24 Plaintiff succeed if the two are not read together or is
25 it so endemic to Plaintiffs' argument from your

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1 perspective that they -- in order to succeed in the case
2 currently in the Court, the two would have to be read
3 together?

4 MR. BERGMANN: Oh, okay. I got it backwards.

5 THE COURT: You got it backwards, but it was
6 actually a helpful explanation.

7 MR. BERGMANN: Yes, yes. Plaintiff can prevail
8 under Article 24-2(a) without prevailing under Article
9 24-2(b), Your Honor.

10 THE COURT: That's the question.

11 MR. BERGMANN: Yes. Sorry I got it confused.

12 THE COURT: It actually worked out fine. It made
13 me think about some other things, so that's good.

14 MR. BERGMANN: I have nothing more to add unless
15 Your Honor has any questions.

16 THE COURT: Let me just look here for a moment.

17 Do we have any clues to the aim of the French
18 treaty or -- and also, a subset of that question -- is
19 the process that was described earlier of getting a
20 French interpretation permissive or mandatory?

21 MR. BERGMANN: I think it's permissive.

22 THE COURT: Permissive. I think it is, yes.

23 MR. BERGMANN: As far as the purpose of the
24 U.S.-French treaty, like all tax treaties, its broad
25 purpose is to facilitate commerce between the United

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1 States and France; to provide provisions for the
2 resolution of disputes between the two countries
3 regarding the application of their tax laws; to provide
4 terms to help avoid fiscal evasion; and to assist in the
5 reduction or elimination of double taxation.

6 Those purposes, I think, are stated in the
7 technical explanations, they are stated in the Senate
8 executive reports when the treaty and the protocols were
9 enacted, and those, I think, are, generally speaking, a
10 number of broad purposes of those -- of the treaty.

11 THE COURT: Okay. But nothing from France?

12 MR. BERGMANN: There's nothing in the record
13 about what France thinks about this treaty.

14 THE COURT: Does it exist?

15 MR. BERGMANN: I --

16 THE COURT: You have obviously done your
17 research, so --

18 MR. BERGMANN: I haven't found -- I mean, I -- I
19 don't speak French, and so it's hard for me -- it would
20 be hard for me to find French stuff myself, although I
21 did not find any U.S. translations of French materials.
22 There's nothing -- nothing obviously showed up when I
23 did my legal research, Your Honor.

24 THE COURT: Okay, all right.

25 Very good. Thank you.

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1 MR. BERGMANN: Thank you, Your Honor.

2 THE COURT: Mr. Horwich, any reply? Please don't
3 repeat the arguments you made earlier, but just use this
4 as an opportunity to reply to the Defendant's arguments.

5 MR. HORWICH: Thank you, Your Honor.

6 Starting off with the statement that a U.S.
7 resident taxpayer would be worse off than a French
8 resident U.S. taxpayer, I don't understand it, and I
9 don't understand it simply because a French resident
10 taxpayer is going to be paying more than 20 percent tax
11 or we're not going to be here.

12 In other words, a French resident taxpayer, and
13 the Plaintiffs in this case, paid 30 percent tax to
14 France. If they had only paid 20 percent, we wouldn't
15 be having this case. By definition, the only time this
16 is going to arise is when a French -- when a French tax
17 is greater than the normal income tax, the Chapter 1
18 tax. It has to start to eat into the NIIT before we are
19 going to be in a position for a tax credit, and only
20 after it goes to the total of the NIIT would we get a
21 full reduction of U.S. tax.

22 So, in other words, in extremely simple terms,
23 and how I would explain this to any client of mine, the
24 U.S. tax is always the baseline. You're never going to
25 do better than that. If you wind up -- you are always

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1 going to pay 23.8 percent tax, minimum, on this. If you
2 wind up paying 25 percent French tax, then it would be
3 jolly nice if you didn't pay any U.S. tax, but what the
4 Government says is, no, you have to pay 28.8 rather than
5 25.

6 A U.S. situated taxpayer would only pay 28.8.
7 There is no situation ever, under any circumstance,
8 where a U.S. resident person taxpayer is worse off than
9 a French resident taxpayer. It makes no sense to argue
10 it under those circumstances.

11 With respect to the statement that the
12 parenthetical in the treaty stops the U.S. Government
13 from repealing the foreign tax credit rules, that an
14 outright repeal is not allowed, I'm sorry, but if
15 Congress tomorrow decided to repeal the U.S. foreign tax
16 credit system, it would repeal the U.S. tax credit
17 system. The treaty is not going to stop Congress from
18 doing what it wants to do in the future.

19 If it does that, we don't have a foreign tax
20 credit system, but this parenthetical is not there to
21 say, Congress, you have restricted your right to be able
22 to do it. Again, it's a non sequitur.

23 With respect to Article 3, paragraph 2, Article
24 3, paragraph 2 is a very sort of normal provision
25 because -- in a treaty, and what it gets at is a simple

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1 problem, and it -- and an easy example is a good
2 example. Let us assume, for sake of argument, that a
3 taxpayer enters into, let's say, an option arrangement
4 where it agrees to sell property, receives a significant
5 premium. So I would like to sell you my piece of land.
6 Here is 30, you give me 30, and you'll pay me 70 -- you
7 have the option to pay me 70 next year. Does that
8 trigger a gain?

9 Under U.S. principles, yes, it would, because the
10 benefits and burdens have shifted. That is what
11 triggers a gain. Under French circumstances, it would
12 not. This happens all the time. What is interest?
13 What is gain? What is residency? You have -- what is a
14 dividend? France will consider a dividend a dividend if
15 it's a payment under corporate law. The United States
16 will look to see whether there's earnings and profits.

17 Countries have rules as to when taxes happen.
18 That is what Article 3, paragraph 2, is designed to do.
19 It is certainly not designed to create a situation where
20 each country can, in derogation of the treaty, say we
21 have a sovereign right to do what we want. Indeed,
22 Article 3, paragraph 2, comes into play here in a couple
23 of contexts.

24 When we talk about limitations, Code Section 904
25 says "Limitation on Credit," and United States income

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1 tax -- and this is something segueing on to the next
2 point -- it's absolutely clear that Article 24-1 on the
3 French side and Article 24-2 on the U.S. side are not
4 parallel. The reason they're not parallel is because
5 normally, most times -- not always -- but French law
6 usually exempts U.S. source income received by U.S.
7 citizens. There isn't a credit.

8 It's a very elaborate -- 24-1 is a very elaborate
9 provision expected to be based on the fact that France
10 does not tax U.S. source income received by a U.S.
11 citizen other than in certain circumstances. So this
12 treaty carves out and says sometimes we are going to
13 give a credit when under domestic law we do; other times
14 we are going to exempt.

15 And as a further nuance in the way the French
16 Government works, French tax works, if you have exempt
17 income, what the French Government does is it says you
18 have to include that income in your tax base. A simple
19 world. If we had 100 of capital gain, U.S. source gain
20 or U.S. source interest -- interest is probably an
21 easier example -- and had 50 of other income, in France,
22 what they do is they would say let's look at how much
23 tax is on 150, and we'll give you a credit for a 100 --
24 150. In other words, we are going to push you up the
25 brackets. It may very well be that this income is

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1 exempt, but we are going to -- in a situation such as
2 that, we are going to make you have to pay more tax than
3 you would have if you had only had 50 of income. We are
4 going to do the difference between 100 and 150. That's
5 what Article 24-1 does.

6 Of course, they are, therefore, going to be
7 different, but what is the term "United States income
8 tax"? Again, United States income tax is better
9 understood as Chapter 1 plus Chapter 2(a). I don't
10 think the parties disagree about that. We have a term.
11 It's not specifically defined. You can get there
12 through Article 2-1 and Article 2-2, but it's defined as
13 United States income tax.

14 Indeed, why is the French treaty, when it talks
15 about the French income tax, which is specifically
16 defined in Article 24-2(d), why does it do that?
17 Because it can't use the Article 2 definition of French
18 income tax, because although there are a couple of taxes
19 which the United States would be willing to allow for a
20 credit, the normal income tax in France and the normal
21 corporate tax, they are not allowing to other listed
22 taxes in the treaty as a credit.

23 They are not allowing the self-employment tax,
24 and they're not allowing -- so the United States will
25 not allow for a credit for self-employment tax, which is

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1 an income tax under French tax principles, and they are
2 not allowing for net wealth tax. So, again, it is
3 not -- there are reasons why they are based in the
4 treaty the way they are.

5 The MAP provision, the mutual assistance
6 provision that, as you said, is certainly not a
7 mandatory provision, and in light of the number of scars
8 I had on my back on the Eshel case, there is no way I
9 would go into a MAP proceeding in which the United
10 States and France do not need to come to a resolution,
11 and France has -- you know, France will do whatever
12 France will do on something like that, but it is
13 unlikely the French Government is going to go out of its
14 way. If they wouldn't do it on CSG and CRVS, which was
15 seriously costing them money, this is not the right
16 place for this kind of procedure and certainly not going
17 to get us to what they would be due.

18 In terms of the preamble to the Treasury
19 regulation, I think it's quite clear what the
20 Government's position is in this case. It feels like if
21 we have a situation where the French Government is
22 not at -- would not be making a formal -- that there
23 hasn't been a pre -- there has not been a protocol to
24 the treaty, the United States never notified the French
25 Government of the new tax, it seems that we are

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1 bootstrapping ourselves here and saying that this is
2 somehow or another more dispositive than simply what we
3 clearly all know, and that's that the Government has a
4 position, and that position is entitled to great
5 deference, but there are other provisions that also
6 are -- there's other jurisprudence involved as well, and
7 liberal interpretation is one of them, and there is
8 ample case law where the courts do not simply follow the
9 United States Government's position.

10 THE COURT: What would you say is the fall-back?
11 Assuming that the deference has limitations, which it
12 does, is it the treaty language? It's the same question
13 I asked Mr. Bergmann. Is it the treaty language that
14 you have to rely on if you don't give deference or
15 automatic deference to that technical interpretation?

16 MR. HORWICH: It is the -- I believe that you
17 would also -- the intent or the expectations of the
18 parties --

19 THE COURT: But the treaty language, as expressed
20 in the treaty language.

21 MR. HORWICH: As expressed in the treaty language
22 in light of the treaty's purpose.

23 THE COURT: In light of the treaty's what?

24 MR. HORWICH: In light of the purpose of the
25 treaty I believe is the --

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1 THE COURT: But as expressed in the language of
2 the treaty?

3 MR. HORWICH: Exactly, so --

4 THE COURT: So it's the treaty document versus
5 the technical interpretation or even this additional
6 citation that Mr. Bergmann gave us afterwards. What
7 about that, the one document or rule that he cited after
8 the NIIT?

9 MR. HORWICH: After the NIIT, we have not had --
10 the French Government has never responded to that.

11 There has not been a response. A requirement, I
12 believe, that this preamble to the Treasury regulation
13 is simply a statement of why we are here, which is that
14 the Government has taken a position of what the treaty
15 language means, which is directly creating a double
16 taxation situation.

17 THE COURT: So the argument on that -- and I was
18 going to ask you a question about this anyway -- but the
19 argument on that rule or the preamble to the rule is
20 that, from your perspective, because the French
21 Government has not responded to it, it has less
22 significance, or how would you state it? It's a
23 one-sided interpretation, in other words?

24 MR. HORWICH: It's a one-sided interpretation.
25 There is no shared expectation based on what the

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1 Government has said.

2 THE COURT: Okay.

3 MR. HORWICH: I think the final point that I --
4 well, I'm perfectly happy to, and we made a calculated
5 decision that I believe the parties have properly
6 briefed 24-2(b).

7 THE COURT: Well, how would you respond to
8 Mr. Bergmann's argument?

9 MR. HORWICH: As we had stated in our brief, the
10 language of 24-2(b) is quite clear in that it is
11 limited, and I will read you the 24-2(b) language.

12 "The United States shall allow a credit against
13 the United States income tax" -- okay, so we are now in
14 the United States income tax -- "the French income tax
15 paid following the two-bite rule."

16 All this is saying is that when the -- it is
17 specifically limited, that what it is saying here is
18 that each tax -- the United States will allow a credit
19 against the French income tax that's paid, and it
20 specifically does not have the "in accordance with"
21 language.

22 There is no -- the -- there is a requirement that
23 it is French income tax, so, therefore, defined in the
24 treaty. There is a requirement that it is United States
25 income tax, which is through Article 2 -- I'm sorry,

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1 Article 2-1 and 2-2, defined in the treaty. There is
2 not a parade of horribles here.

3 If it's U.S. source income on which this is going
4 on, this coverage, under the three-bite rule, is
5 foreign. There is no issue that we see that is creating
6 a problem reading this separately.

7 THE COURT: Okay. Anything else?

8 MR. HORWICH: I think I am finished.

9 THE COURT: Let me just look at my notes for a
10 moment.

11 All right. I thank you, both. I am reminded
12 that you are going to get that document, the French tax
13 return, by Tuesday, correct?

14 MR. HORWICH: That is correct.

15 THE COURT: Is that what you were asking?

16 LAW CLERK: Do you want a response from the
17 Government once that document is --

18 THE COURT: Just ask the question.

19 LAW CLERK: Did you want a response from the
20 Government once that document is produced?

21 THE COURT: The tax return?

22 LAW CLERK: Mr. Bergmann asked for that document
23 as part of the proof in the case. Do we need a response
24 when that is filed?

25 THE COURT: Oh, I see what you're saying, okay.

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1 It's always helpful to have a Law Clerk that's as smart
2 as you are.

3 I guess the question is, once you get the French
4 tax return on Tuesday, how do you see what you need to
5 do with it to see if it's sufficient for your purposes
6 for a calculation? Right now I'm operating on a request
7 for \$3,851. Do you need two weeks? Do you need three
8 weeks to figure this out?

9 MR. BERGMANN: Well, I will need to provide it to
10 the people that know how to read it at the Service, and
11 then I'll -- if there are any deficiencies in it, what I
12 would do is just reach out to Mr. Horwich and attempt to
13 negotiate with him.

14 THE COURT: Right. But what I need to know is a
15 time that you can get back to us. You can have more
16 time. I'm just saying, how much time do you need in
17 theory -- although it is manageable with a request for
18 additional time -- how much time should we put on it at
19 this point?

20 MR. BERGMANN: Yes, yes. Unfortunately -- the
21 answer to that question, unfortunately --

22 THE COURT: It is the IRS. I get that.

23 MR. BERGMANN: No, it's not the IRS that's the
24 issue, Your Honor. It's me. I have a very liberal
25 vacation schedule planned this summer for the first time

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1 in a while. My family and I are going away for three
2 weeks in July and early August, and so to the extent
3 that the Service is able to get back to me, if they do
4 it, say, by July the 15th, I won't necessarily
5 personally be in a position to do anything with it --

6 THE COURT: So when are you leaving?

7 We can go off the record here for a moment.

8 (Discussion off the record.)

9 THE COURT: I was going to say, why don't we
10 get -- we are going to need some time to write this up
11 anyway, so it's really not going to impinge on what
12 we're doing. Why don't you -- when is Labor Day? Labor
13 Day is the 5th. I want to give you a couple weeks to
14 digest it when you come back, assuming you do get it
15 back, but let's say that you get back to us by September
16 7th with an answer one way or the other. File something
17 that says yea or nay.

18 MR. BERGMANN: Okay.

19 THE COURT: If you're able to do it earlier,
20 there's nothing stopping you from filing it earlier.

21 MR. BERGMANN: Yes.

22 THE COURT: So we will do it that way.

23 MR. BERGMANN: Thank you.

24 THE COURT: All right.

25 With that, I really want to thank you both for

1 very competent briefing, very competent arguments. This
2 is a complicated case in the sense of it's a lot of
3 different areas of tax law that we're going to dive into
4 and a lot of policy arguments that were presented. You
5 each think it's pretty simple, but we have to digest
6 both of your pretty simple arguments, and they don't
7 necessarily agree.

8 So we'll take a look at it, and we'll start --
9 we'll start working on it, but, you know, we'll get you
10 an opinion as quickly as we can, understanding more than
11 the complexity of it, actually, the gravity of it in
12 terms of the implications. So I thank you, both.

13 I do want to -- you can sit down for moment. I
14 have one thing. We're off the record now.

15 (Whereupon, at 12:59 p.m., the proceedings were
16 adjourned.)

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4 I, Susanne Bergling, court-approved transcriber,
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12 DATED: 7/18/2022

s/Susanne Bergling

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SUSANNE BERGLING, RMR-CRR

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